No. 86-604

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

S. L. TOWNLEY, *et al.*,

Petitioners,

v.

JAMES T. CLARK, JR.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether trial counsel acted unreasonably in failing to seek additional evidence in mitigation of the death penalty from lay witnesses when, in response to counsel's request, the defendant failed to reveal such additional evidence?

II. Whether the defendant has established actual prejudice as as a result of counsel's failure to investigate and present psychiatric evidence in mitigation of the death penalty, when such evidence would have been unfavorable to the defendant and established an alternative basis for imposition of the death penalty?

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners, S. L. Townley, *et al.*, respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled proceeding on June 5, 1986.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Fourth Circuit is unpublished, and is reprinted in the appendix hereto. (Pet. App. A.)[1]

The memorandum decision of the United States District Court for the Eastern District of Virginia (Bryan, D.J.) has not been reported. It is reprinted in the appendix hereto. (Pet. App. B.)

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[1] References to the appendix hereto will be designated (Pet. App._____)

JURISDICTION

The judgment of the Court of Appeals was entered on June 5, 1986. (Pet. App. A.) Petitioners filed a Petition for Rehearing *en banc* which was denied on July 17, 1986 (Pet. App. D). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

The Sixth Amendment to the United States Constitution states, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for the defense.

STATEMENT OF THE CASE

The respondent, James T. Clark was convicted by a jury of willful, deliberate and premediated murder for hire, a capital offense, on August 29, 1978, and sentenced to death by a jury in a separate sentencing proceeding held pursuant to § 19.2-264.4 of the Code of Virginia. At a second sentencing hearing before the court pursuant to § 19.2-264.5 of the Code of Virginia the sentence of death was imposed. Upon affirmance of the death sentence by the Supreme Court of Virginia, *Clark v. Commonwealth,* 220 Va. 201, 257 S.E.2d 784 (1979), *cert. denied,* 444 U.S. 1049 (1980), Clark filed a petition for a writ of habeas corpus in state circuit court. The circuit court judge who presided over the trial also presided over the state habeas hearing.. After hearing evidence concerning Clark's family background and anti-social personality, the court commuted the death sentence to life imprisonment. This decision was reversed by the Supreme Court of Virginia, *Virginia Department of Corrections v. Clark,* 227 Va. 525, 318 S.E.2d 399 (1984). Thereafter, respondent instituted this

action by filing a habeas corpus petition under 28 U.S.C. § 1254, in the United States District Court for the Eastern District of Virginia alleging that he was denied the right to effective assistance of counsel during the penalty phase of his trial for capital murder. Specifically, Clark claimed that counsel failed to investigate and present additional evidence in mitigation of the death penalty.

A. The Lay Evidence

At his sentencing proceeding before the jury, trial counsel presented evidence in mitigation consisting of the testimony of Clark's mother and father. Mr. Clark testified that his son was a fairly normal child until age nine, when he received first degree burns over 40% of his body. (App. 6).[2] Following this incident, he received intensive treatment and remained in the hospital for one year. (App. 7). As a result of the incident his whole character changed, he lost interest in school and began to have "some legal problems." (App. 7).

Clark's mother testified that Clark was normal "until he was burnt." (App. 10). She further stated that when he was in the hospital he was pampered a lot, but she did not notice any changes in his personality after the incident and she saw no "proclivity towards violence." (App. 10). Evidence was also adduced that the parents had separated when Clark was three years old and that throughout his childhood, he was shifted back and forth among his mother, father and grandmother.

At the habeas hearing, the respondent introduced the testimony of several witnesses in addition to his mother and father who chronicled his background in more detail. According to their testimony, while Clark's father worked his mother would often go out leaving Clark and his brother at home alone. Finally, Clark's mother abandoned the family for good and started living with a married man. Clark and his brother visited her during that period of time, but for the most part lived with their maternal grandmother. When the mother's relationship ended, she moved to the District of Columbia and became a prostitute. (App. 432-33). Clark lived with her on various occasions during that time

[2] References to the joint appendix filed below will be designated (App.).

and was subjected to the influence of a "madam" and a professional gambler who was involved with Clark's mother. (App. 436-37).

When Clark was about nine years old, he and his brother were sent to live with their father who had remarried. (App. 435-36). While they were living with their father, Clark attempted to put gasoline in a model airplane causing the plane to explode, resulting in third degree burns over 40% of his body. (App. 207-09). His brother saved his life by pushing him into a portable swimming pool. (App. 207). Clark's grandmother testified in detail concerning the infestation and stench of Clark's wounds. (App. 210-12).

Sometime after Clark's release from the hospital, he and his brother again went to live with their mother. She had by this time remarried and moved to Maryland. When the marriage turned sour, Clark's mother became involved in a lesbian relationship. (App. 442-47). The termination of the lesbian relationship led Mrs. Clark to attempt suicide. Clark and his brother found her in a coma following the attempt. (App. 448). Upon her recovery she returned to prostitution and reestablished her friendship with the madam who cared for Clark and his brother during their mother's convalescence. (App. 448-51). Clark's brother, to whom he was closer than anyone, was murdered as he was traveling home upon discharge from the Army. The case was never solved. (App. 220-21).

Most of the above facts were elicited through the testimony of Clark's mother. However, she failed to reveal this information to Clark's counsel, who had interviewed her on at least two occasions prior to the sentencing hearing. (App. 508).

Several other witnesses testified at the habeas proceeding, including Clark's two grandmothers, a neighbor of the family when they lived in Maryland, a principal at one of the schools Clark attended and a teacher. Although trial counsel had interviewed several potential witnesses whose names had been provided by Clark, counsel was not provided the names of these five witnesses. Their testimony revealed that Clark and his brother lacked supervision and it appeared as though their mother had no concern for their welfare. (App. 271-73, 293).

B. The Psychiatric Evidence

Prior to trial, a mental examination was performed at the request of Clark's trial counsel. Dr. Ludwig Fink, a psychiatrist, found Clark competent to stand trial but noted that during the doctor's interview with him he "remained . . . pleasant, almost too pleasant considering the seriousness of the alleged crime. ... What struck me was his complete lack of emotion and any affect. . . . With similar detachment he stated he would try to obtain the death sentence and be executed rather than be sentenced to life in prison. For a twenty-one year old this is quite an unusual statement." (App. 15). Dr. Fink, without suggesting that Clark suffered from any psychological disorder, recommended that he be sent to a mental hospital for a more thorough examination of his mental condition before trial. (App. 15). Trial counsel did not follow Dr. Fink's advice and presented no psychiatric evidence during the jury sentencing hearing.

Prior to sentencing by the judge, counsel, requested another psychiatric examination which was performed by Dr. William Allerton, a psychiatrist. He diagnosed Clark as having an anti-social personality, (App. 37), but found that he was not suffering from a mental illness. (App. 38).

During the habeas hearing, psychiatric evidence was presented which established that Clark was abnormal in several respects. Dr. Richard Saunders, a clinical psychologist, testified that Clark evidenced no guilt about his conduct, (App. 308), and no significant emotional impact at the loss of his brother, or his experience when burned. (App. 316-17). His level of moral functioning, according to Dr. Saunders, was at a primitive level in that "he has not formed a conscience in . . . the normal way, and his ability to appreciate the feelings of another person . . . are grossly impaired." (App. 330-32). Dr. John Follansbee, a psychiatrist, testified that the matrix for conscience is established very early in life and that Clark suffered damage in the first three years of his life to that matrix, impairing his ability to add content thereto in later years. (App. 370).

Both doctors felt that Clark suffered from an anti-social personality and that he was a very dangerous individual who could kill again for money. (App. 348, 392). Although Dr. Follansbee declined to predict what Clark's future behavior might be, Clark concluded that in 1978 when Clark committed the murder, he was a very dangerous and violent individual, (App. 391, 392). Dr. Follansbee was not aware of any intervening circumstance that would prove that Clark could not be a violent and dangerous individual. (App. 393). Trial counsel testified that they would not have introduced the psychiatric evidence at the habeas hearing because it would have provided the prosecution with evidence of "future dangerousness." (App. 531-32, 658-60). At trial, the Commonwealth had sought and obtained the death penalty on the ground that Clark's conduct met the "vileness" condition in Virginia's death penalty statute. § 19.2-264.4C. The death penalty could also have been imposed, under this statute, if the jury believed that the defendant "would commit criminal acts of violence that would constitute a continuing serious threat to society." § 19.2-264.4C.

The district court found that counsel's performance in investigating and presenting background and psychiatric evidence was unreasonable and that the errors were sufficient to undermine confidence in the outcome of the sentencing phase of the trial. The Fourth Circuit affirmed the district court's decision.

REASONS FOR GRANTING THE WRIT

I.

The decision below, reflects a misapprehension and gross misapplication of the *Strickland* standards and conflicts with decisions of another Circuit Court of Appeals.

The right to counsel which is guaranteed by the Sixth Amendment and made applicable to the states through the Fourteenth Amendment includes the right to effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 770-771 (1970). This case presents the question of whether counsel was ineffective in failing to present additional evidence in mitigation of the death penalty when counsel had no reason to believe that additional lay evidence was available, and when allegedly available psychiatric evidence would have been prejudicial to the defendant. While paying lip service to the standards enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984), for determining whether an individual has been denied his Sixth Amendment right to the effective assistance of counsel, the Fourth Circuit has in fact drastically undercut the *Strickland* principles and created a new set of standards to be applied in evaluating counsel's performance.

A claim of ineffective assistance of counsel must be measured against the two-part test announced in *Strickland*. First, the respondent must show that "counsel's representation fell below an objective standard of reasonableness." 466 U.S. at 688. Second, respondent must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694.

In assessing the performance component, the Fourth Circuit found that counsel's "failure . . . to pursue further evidence from lay witnesses, all of whom were available upon reasonable inquiry, . . . , was unreasonable," *Clark v. Townley*, No. 85-6601, *slip op.* at (4th Cir. June 5, 1986). (Pet. App. A-3). The court thus rejected an important *Strickland* principle which recognizes that "the reasonableness of counsel's actions . . . [is] usually based, quite properly, . . . on information supplied by the defendant" and "what investigative decisions are reasonable depends critically on such information." 466 U.S. at 691.

Moreover, *Strickland* requires a defendant to overcome the "strong presumption that counsels' conduct falls within the wide range of reasonable professional assistance;" in order to obtain relief 466 U.S. at 689. The Fourth Circuit failed to apply that

presumption to the salient facts of this case. These facts show that Clark's counsel talked to him on several occasions about his family background. They also interviewed his mother and father who were called to testify on respondent's behalf during the sentencing hearing. Although counsel inquired, they were never advised by Clark or his parents of any other witnesses who could provide information that would be helpful in mitigation. (App. 499-503). Ironically, the evidence presented at the habeas hearing that was considered to be most "compelling" by the District Court was provided by Clark's mother who was apparently willing to disclose more information to Clark's habeas counsel than she disclosed to trial counsel. The evidence in mitigation presented by trial counsel, while not so extensive as that presented at the habeas proceeding, was presented to the extent that it was revealed to counsel.

Counsels' performance here was considerably more thorough and more diligent than that of counsel in *Strickland*, who spoke with the defendant about his background and talked to the defendant's wife and mother on the phone, but failed to follow-up on his conversations or present *any* evidence in mitigation at the sentencing hearing. 466 U.S. at 673. Yet, the Fourth Circuit found counsel's actions here to be professionally unreasonable. Here, as in *Strickland*, counsel could have reasonably surmised from conversations with Clark and his parents that Clark's background offered no additional mitigating evidence.

Under the Fourth Circuit's newly created standard for determining "reasonableness," counsel is prohibited from relying on the information supplied by a defendant and his family and is required to aimlessly seek additional information from unidentified sources. Ignoring *Strickland's* objective standard of reasonableness and the prejudice prong of the *Strickland* standard, the Fourth Circuit has held that the mere fact that other witnesses might have been available, or that other testimony might have been elicited from those who testified, is sufficient to establish ineffectiveness of counsel. The conflict between *Strickland* and the decision below could not be more stark.

Equally apparent is the conflict between the decision below and *Burger v. Kemp*, 753 F.2d 930, 938 (11th Cir. 1985). There, neither the petitioner nor his mother provided the attorney with

the names of individuals subsequently located by habeas counsel. However, the Eleventh Circuit rejected the notion that counsel was required to "pursue every path until it bears fruit or all hope withers." 753 F.2d at 940. In upholding the reasonableness of trial counsel's performance, the Eleventh Circuit said:

> It is true that the petitioner's current attorneys were successful in finding other witnesses who could paint a tragic childhood background; it is also true that they were able to 'elicit' a more compelling explanation of Berger's background from his mother than did [trial counsel].

The Court then concluded that where the petitioner has given counsel no reason to believe that pursuing certain investigations would be beneficial, counsel's failure to pursue those investigations may not later be challenged as unreasonable." 753 F.2d at 940.

The United States Court of Appeals for the Eleventh Circuit has further addressed this issue in several cases with similar factual situations, and upon proper application of the *Strickland* standards has reached the opposite result. *See Hitchcock v. Wainwright*, 770 F.2d 1514 (11th Cir. 1985) (counsel's presentation of mitigating evidence reasonable where evidence developed to some extent for the jury even though trial counsel was unable to elicit mitigating evidence to the extent elicited during habeas hearing); *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir. 1985) (counsel not ineffective where defendant and his sister were asked about potential character witnesses and "suggested no possibilities"); *Mitchell v. Kemp*, 752 F.2d 886 (11th Cir. 1985) (counsel's failure to investigate petitioner's background held reasonable in view of petitioner's failure to inform counsel about witnesses who could have provided "powerful mitigating evidence."); *Tucker v. Kemp*, 776 F.2d 1487 (11th Cir. 1985) (counsel not ineffective for failing to present petitioner's "turbulent family history" in view of defendant's failure to provide names of witnesses requested by counsel.)

The Fourth Circuit has established a precedent directly at odds with this Court's ruling in *Strickland*. Policy considerations dictate that if a sentence of death, imposed by a state court and

upheld by that state's court of last resort, is to be overturned by a federal court, it should not be done merely because of a disagreement with the results, but only upon proper application of the standards of law established by this Court. Although *Strickland* establishes general guidelines, lower courts need additional guidance on the application of its specific principles. Consideration of this issue by this Court is essential.

II.

The decision below, that counsels' failure to further investigate and present psychiatric evidence during the penalty phase of respondent's trial for capital murder was prejudicial, ignores the *Strickland* standards for determining prejudice and conflicts with the decisions of another Circuit.

Regardless of the merits of Clark's claim that trial counsel was unreasonable in failing to investigate psychiatric evidence, the Fourth Circuit failed to recognize that Clark did not establish prejudice as a result of counsel's performance.

The Fourth Circuit found that the respondent established a reasonable probability that in the absence of counsels' errors the outcome of the trial would have been different. This conclusion evinces the Court's confusion over the standard for determining performance and that for determining prejudice. Several examples of this confusion are apparent.

First, the Fourth Circuit incorrectly found that *Strickland* precluded the use of hindsight in assessing not only the performance issue, but the prejudice issue as well. Specifically, it said, "High deference to professional judgments of counsel might have carried the day had the psychiatric material been timely obtained so that the professional decision could have been made at the critical time, i.e. at the sentencing phase." (Pet. App. A-4, n. 1). Hindsight, however, "may not be used to excuse a lapse in professional performance." *Id.* In other words, the Fourth Circuit concluded that a lapse in counsel's professional performance which satisfies the test for unreasonableness automatically satisfies the test for prejudice, and notwithstanding the fact that the mitigation value of the evidence may be highly speculative, hindsight may not be used to evaluate it. Such an anomalous interpretation of *Strickland* was clearly not intended.

While it is true that *Strickland* prohibits the use of hindsight in assessing counsel's performance, 466 U.S. at 689, there is nothing in *Strickland* which suggests that hindsight can not be used in assessing prejudice. To the contrary, the Court in *Strickland* used such hindsight to determine what impact, if any, the evidence which trial counsel failed to present would have had on the outcome of the sentencing proceedings. 466 U.S. at 699-700.

Second, assuming arguendo, that counsels' failure to seek out additional psychiatric evidence was professionally unreasonable, *Strickland* requires a defendant to show that the unreasonable errors *"actually* had an adverse effect on the defense." 466 U.S. at 693 (emphasis added). Such a showing here is impossible because of the undisputed characterization of the psychiatric evidence as evidence which "highlighted Clark's status as a serious threat to society," (Pet. App. A-4, n. 1), and the Court's acknowledgment that had counsel been aware of this evidence, they would not have used it because it would have provided the jury with another valid aggravating circumstance to support the death sentence. (Pet. App. A-4, n. 1).[3]

In *Strickland,* the court found no prejudice where the admission of the omitted evidence "might even have been harmful to his case: . . ." 466 U.S. at 700. There is at least as much reason to conclude in this case, as in *Strickland,* that the presentation of the evidence which trial counsel failed to present might have been harmful to Clark's case.

Further the Court's decision misapplies *Strickland* to the extent it relied on the District Court's undue emphasis on the fact that the respondent had only to persuade one of the twelve jurors to hold out for mitigation. Such unwarranted deference to the "single juror" aspect of Virginia's capital murder law is inconsistent with *Strickland's* objective standard that the court is to "proceed on the assumption that the decision maker is

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[3] Clark's death sentence was based solely upon the jury's finding that the circumstances of murder-for-hire were sufficiently "vile." *Clark v. Commonwealth,* 220 Va. 201, 213, 257 S.E.2d 784, 796 (1979), *cert. denied,* 444 U.S. 1049 (1980).

reasonably, conscientiously, and impartially applying the standards that govern the decision," 466 U.S. at 695. It also represents an application of the "some conceivable effect" standard expressly rejected in *Strickland*. 466 U.S. at 693. As previously stated, *Strickland* requires that a defendant establish that counsel's performance *"actually* had an adverse effect on the defense" to meet his burden of showing that "the decision reached would reasonably likely have been different absent [counsel's] errors." 466 U.S. at 696.

The court's decision on the prejudice question is also in conflict with several decisions of the United States Court of Appeals for the Eleventh Circuit. *See Francois v. Wainwright*, 763 F.2d 1188 (11th Cir. 1985) (counsel's failure to present evidence of a chaotic antisocial upbringing not prejudicial); *Burger v. Kemp*, 753 F.2d 930 (11th Cir. 1985) (counsel's failure to present evidence of a split-personality was not prejudicial because such evidence might have been harmful to the defendant); *Hitchcock v. Wainwright*, 770 F.2d 1514 (11th Cir. 1985) (counsel's failure to present additional mitigating evidence not prejudicial where no indication that attorney would have used evidence).

Moreover, "when a defendant challenges a death sentence . . . , the question is whether there is a reasonable probability that, absent the errors, the sentencer—including the appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. The Supreme Court of Virginia, upon a de novo review, reinstated the death penalty after balancing the aggravating and mitigating circumstances. *See Virginia Department of Corrections v. Clark*, 227 Va. 525, 318 S.E.2d 399 (1984).

As with the Fourth Circuit's findings on the reasonableness of counsel's actions, its ruling with respect to the existence of prejudice also represents an inexplicable erosion of the *Strickland* standards in violation of public policy considerations. The departure from the accepted standards of *Strickland* is so drastic as to require invocation of this Court's supervisory power.

CONCLUSION

For various reasons asserted herein, this Petition for Certiorari should be granted.

Respectfully submitted,

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**Counsel of Record*

CERTIFICATE OF SERVICE

I, Jacqueline G. Epps, a member of the bar of this Court, hereby certify that on this 13th day of October, 1986, three copies of the Petition for a Writ of Certiorari in the above-entitled case were mailed, first class postage prepaid, to David J. Fudala, Esquire, 4010 University Drive, Fairfax, Virginia 22030, counsel for respondent. I further certify that all the parties required to be served have been served.

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-6601

James T. Clark, Jr.,

Appellee,

versus

S. L. Townley;
Gerald Baliles,

Appellants.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge. (C/A 84-1271-AM).

Argued: March 3, 1986 Decided: June 5, 1986

Before WINTER, Chief Judge, and MURNAGHAN and ERVIN, Circuit Judges.

Jacqueline G. Epps, Senior Assistant Attorney General (Mary Sue Terry, Attorney General of Virginia on brief) for Appellant; David J. Fudala (Hall, Surovell, Jackson & Colten, P.C. on brief) for Appellee.

PER CURIAM:

In a Virginia state court proceeding, James T. Clark, Jr. was found guilty by a jury of willful, deliberate, and premediated murder for hire. In the separate sentencing hearing, a sentence of death was meted out.

We concern ourselves here solely with the question, procedural in nature, relating only to the propriety of the sentencing, guilt not being open to question. The crime possessed literally no redeeming features. The question is of no mean constitutional significance, namely, whether the legal representation afforded Clark with respect to the sentencing aspect was ineffective as that term is elucidated in *Strickland v. Washington*, 466 U.S. 668 (1984).

Prior to the trial, defense counsel obtained a psychiatric evaluation by Dr. Ludwig Fink who concluded that Clark was competent to stand trial. Dr. Fink noted, however, that he had been "struck [by Clark's] complete lack of emotion [about the crime] and of any affect . . . With similar detachment [Clark] stated that he would try to obtain the death sentence and be executed rather than be sentenced to life in prison. For a 21 year old this is quite an unusual statement." Dr. Fink went on to state "[w]hile there is no question that he is competent to stand trial and that he is aware of the gravity of his offense, considering his attitude I would suggest that he be sent for a more thorough examination of his mental and emotional condition to a mental hospital before his trial."

Clark's formative years from infancy on provided a litany of things which were extremely unfortunate. His parents had been separated at an early age, he suffered a painful episode resulting in burns over 40% of his body with subsequent "wild" behavior. Clark's brother, to whom, in all the world, he alone was attached, was mysteriously killed. Clark and his brother had lived for some time on the streets at the early ages of fifteen or sixteen, and had sheltered for a time with a prostitute. Clark's mother had performed as a prostitute. His custody was shifted back and forth between his parents and much of his life in early years was passed in the company of babysitters.

Counsel for Clark did not seek psychiatric testimony for the purpose of developing mitigating circumstances in an attempt to avoid imposition of a sentence of death. The route was available for counsel for Clark to obtain, while seeking evidence of mitigation, a protective order prohibiting use of psychiatric reports at the sentencing proceeding unless Clark gave his consent.

It has been held in *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) "that the sentencer in all but the rarest kind of capital case [should] not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (Emphasis in original).

Following affirmance of Clark's death sentence by the Virginia Supreme Court, *Clark v. Commonwealth*, 220 Va. 201, 257 S.E.2d 784 (1979), *cert. denied*, 444 U.S. 1049 (1980), a petition for a writ of *habeas corpus* was filed in state court. There, extensive testimony concerning Clark's upbringing and his familial surroundings, together with evidence of psychiatric aspects of the matter, was developed. The state court judge who presided commuted the death sentence to life imprisonment. Following reversal of that order by the Virginia Supreme Court, a federal *habeas corpus* proceeding took place, and Judge Albert V. Bryan, Jr. granted relief to the extent of modifying the sentence which the Commonwealth of Virginia might impose, vacating the death sentence and ordering resentencing in the state court. He concluded:

> Faced with almost certain defeat at the guilt stage of the proceeding, with the only hope for their client to be the presentation of some evidence of mitigation at the sentencing phase, trial counsel's [sic] failure to seek out psychiatric evidence or at least to pursue further evidence from lay witnesses, all of whom were available upon reasonable inquiry, to aid them, was unreasonable.

Our own examination of the record satisfies us that Judge Bryan's conclusion was correct that the *Strickland* standards as to inadequacy of performance and likelihood of prejudice have been met, and, therefore, we affirm his decision for the reasons advanced in his opinion. *Clark v. Townley*, United States District Court for the Eastern District of Virginia, Civil Action #84-1271-AM, June 24, 1985, as amended July 12, 1985.[1]

AFFIRMED.

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[1] In doing so, we are not unsympathetic with the plight of counsel for Clark, faced with a client not cooperative in efforts to mount a defense—a client who expressed a preference for death rather than a life sentence. They concluded that the psychiatric evidence developed subsequent to Clark's conviction and sentencing, in the exercise of their best professional judgment, would not have been introduced at the sentencing stage of the trial because it highlighted Clark's status as a serious threat to society. High deference to professional judgments of counsel might have carried the day had the psychiatric material been timely obtained so that the professional decision could have been made at the critical time, *i.e.*, at the sentencing phase. However, just as hindsight is not to be employed against counsel in such situations, *Strickland*, 466 U.S. at 688-89, it may not be used to benefit counsel and excuse a lapse in professional performance. "[V]iewed as of the time of counsels' conduct," under the facts of the case as Clark's counsel knew them, including the report of Dr. Fink, counsel's determination not to use the psychiatric evidence at the sentencing phase was not the *only reasonable one*. *Id.* at 690.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

JAMES T. CLARK,

Petitioner,

V. **CIVIL ACTION NO. 84-1271-AM**

S. L. TOWNLEY, et al.,

Respondents.

O R D E R

For the reasons set forth in the Memorandum Opinion this day filed, it is ORDERED that:

1. The petition for habeas corpus, to the extent it challenges the legality of the sentencing procedure pursuant to which the petitioner was sentenced to death on November 21, 1978 by the Circuit Court of Fairfax County, Virginia, in accordance with the August 29, 1978 verdict of the jury, is granted.

2. The said sentence of death is vacated.

3. The petitioner shall be resentenced in the Circuit Court of Fairfax, Virginia, within a reasonable time, either by a judge of that court of a jury impaneled pursuant to Va. Code § 19.2-264.3C.

/s/ G. V. B.
United States District Judge

Alexandria, Virginia
June 24th, 1985

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

JAMES T. CLARK,

Petitioner,

V. CIVIL ACTION NO. 84-1271-AM

S. L. TOWNLEY, et al.,

Respondents.

MEMORANDUM OPINION

This action involves a petition for habeas corpus filed pursuant to 28 U.S.C. § 2254 by a Virginia prisoner who has been sentenced to death for capital murder under Va. Code § 18.2-31(b).[1]

The prior proceedings which bring the matter to this court are these:

1. On July 17, 1978 the petitioner was indicted by a grand jury of the Circuit Court of Fairfax County, Virginia, in a two count indictment charging that on January 31, 1978 he feloniously for hire murdered one George Scarborough (Count I) in violation of § 18.2-31, and that on the same date he displayed a firearm in a threatening manner while committing the murder, in violation of § 18.2-531 (Count II).[2]

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[1] § 18.2-31, Code of Virginia reads:

> "*Capital murder defined; punishment.*—The following offenses shall constitute capital murder, punishable as a Class I felony: .... (b) The willful, deliberate and premediated killing of any person by another for hire."

[2] Count II was not submitted to the jury.

2. On August 29, 1978, after a one day trial a jury found the petitioner guilty as charged in Count I. In a separate penalty proceeding held the same day pursuant to § 19.2-264 the jury found that the petitioner's conduct was "outrageously or wantonly vile, horrible or inhumane in that it involved depravity of mind or aggravating circumstances" and fixed his punishment at death.

3. On November 21, 1978, after a sentencing hearing pursuant to § 19.2-264.5, the trial court imposed the death penalty.

4. That sentence was affirmed on direct appeal to the Virginia Supreme Court. *Clark v. Commonwealth*, 219 Va. 237, 257 S.E.2d 784 (1979), and the Supreme Court of the United States denied certiorari, 444 U.S. 1049 (1980).

5. On September 24, 1980 petitioner filed a petition for habeas relief in the state court of his conviction. While a number of grounds were asserted in support of his challenge to the legality of his conviction and sentence, an evidentiary hearing held on April 21 and 22, 1982 was limited to the claim that trial counsel did not afford petitioner reasonably effective representation at the sentencing stage of the trial. All other claims were reserved by the trial court.[3]

6. On September 1, 1982 the trial court issued an opinion finding that trial counsel's performance at the sentencing stage fell below the range of competence demanded of attorneys in criminal cases (Habeas Record 141). Specifically he found that, although on notice that there "existed in Petitioner's case psychiatric issues and aspects of his background worthy of exploration as evidence in mitigation . . . [t]rial counsel failed to adequately and properly investigate, develop, consider and present lay and psychiatric evidence in mitigation of the death penalty." Although not addressing by name the question of prejudice, the trial court further found that "[a]n adequate investigation by trial counsel would have revealed mental abnormality and background and familial circumstances entitled to be given independent mitigating weight in sentencing" *(id.* 152). He concluded that the appropriate relief was to commute the sentence to life *(id.* 153), and at a resentencing on September 10, 1982, the court imposed a life sentence.

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[3]See the discussion of respondents' assertion that these other claims were abandoned, post at p. 6.

7. The Commonwealth of Virginia appealed this decision to the Virginia Supreme Court. On June 15, 1984 that court reversed the judgment of the trial court, concluding that petitioner had received effective assistance of counsel during the penalty stage of his trial as to both the performance and prejudice components of the inquiry.[4] The trial court was directed to fix a date for petitioner's execution. *Virginia Dept. of Corrections v. Clark*, ____ Va. ....., 318 S.E.2d 399 (1984). A Petition for Rehearing, (Respondent's Ex. I) requesting that the matter be remanded to the Circuit Court to consider the other grounds which formed the basis of petitioner's challenge and which had not been considered by the trial court, was denied on September 7, 1984.

8. On December 17, 1984 this action was filed, the state trial court in the meantime having issued a stay of execution until February 14, 1985, conditioned on the filing of the instant action.

9. On February 11, 1985 this court entered a consent order staying execution of the death sentence during the pendency of the proceedings in this court and any appeal to the United States Court of Appeals for the Fourth Circuit.

10. On June 7, 1985 this court heard argument on the pending motions in the case. While petitioner asserts in his brief that an evidentiary hearing in this court is required, no showing has been made of any additional evidence necessary to resolve the issues before the court, and the court finds the present record adequate without a further hearing, evidentiary or otherwise. The motions presented on June 7, 1985 were a Motion to Strike and a Motion to Dismiss, both filed by the respondents.

The Motion to Strike addresses an affidavit filed by the state sentencing judge in which he states, among other things, that had the evidence which was presented to him at the habeas hearing been presented at the sentencing hearing to him or to the jury, "it

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[4] By the time the state habeas proceeding reached the appellate level, the case of *Strickland v. Washington*, 52 U.S.L.W. 4565 (May 14, 1984), has been handed down by the Supreme Court. The Virginia Supreme Court relied on it in discussing the necessity of proof of prejudice before ineffectiveness could be established. The trial court had not discussed that issue; however rather than remanding the action to the trial court for such a determination, the Virginia Supreme Court decided it.

would have been given very serious consideration and weight in my decision of whether to impose the jury sentence of death." The Motion to Strike this affidavit is based on the ground that evidence of the trial judge's "probable response to the evidence adduced at the habeas hearing" is inadmissible. *Washington v. Strickland,* 693 F.2d 1243, 1263 (5th Cir. 1982).

The Motion to Dismiss addresses the merits of the habeas corpus petition. Because it entails consideration of matters outside the pleadings the motion will be treated as one for summary judgment. Counsel were so advised at oral argument, and in his response to the motion petitioner has also discussed matters outside pleadings, specifically, the record of the proceedings in the state courts.

Following oral argument decision was reserved to allow the court to consider the transcripts and record in the state court proceedings. That has now been accomplished.

MOTION TO STRIKE

The affidavit of the state judge is very relevant, in the court's view, to the petitioner's claim of prejudice. Whether there is prejudice depends upon "whether there is reasonable probability that, absent the errors [of counsel], the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland v. Washington,* 52 U.S.L.W. 4565 at 4572 (May 14, 1984). That same case defines reasonable probability as being a probability sufficient to undermine confidence in the outcome. The affidavit of the judge does not go so far as to say that he would probably not have imposed the death penalty had the mitigating evidence been presented. He says only that it would have been given very serious weight and consideration by him in his decision whether to impose the death penalty. Nevertheless the statement is sufficient to undermine this court's confidence in the outcome, that outcome being of course the decision to impose the jury sentence of death.

At the circuit court level, the question is *Strickland* was the admissibility of a state trial judge's testimony, to support the state's position, that the new proffered mitigating evidence would not have altered his decision to impose the death penalty and that consequently there was no prejudice. Here of course the testimony is offered to establish prejudice. The statement of the Supreme Court in *Strickland* that "evidence about the actual process of decision, if not a part of the record of the proceeding under review . . . , should not be considered in the prejudice determination" must be considered in light of the circuit court decision. The court cannot, from the opinions of those courts, find any support for the proposition that such testimony should be admissible for the purpose of establishing prejudice, but inadmissible for the purpose of showing an absence of prejudice.

Consequently the court concludes that the affidavit, and any testimony, of the state judge, are inadmissible. The Motion to Strike will be sustained.

MOTION TO DISMISS

The respondents assert that, while the petition alleges many bases for its challenge to the state court judgment, many of them have been abandoned. The record is not entirely clear whether on April 21 and 22, at the habeas evidentiary hearing, the issues other than ineffective representation of counsel were reserved. Certainly no other issues were the subject of that hearing. The statement of counsel for the state at pp. 41-42 of the transcript of that hearing that "we're only here to evaluate the claims in paragraphs 24 and 25 [the ineffectiveness claims] of Mr. Clark's original petition" is not dispositive of the status of the other claims; however it is apparent that counsel for petitioner felt the other claims were reserved, and specifically purported to reserve those issues in his Memorandum of Points and Authorities, p. 1, filed with the state court on April 20, 1983.

When petitioner prevailed on the ineffectiveness issue and the trial court commuted the sentence to life, the state immediately appealed. The trial court at the habeas hearing apparently felt there were unresolved issues in the case after his September 1, 1982 letter opinion. In that opinion the court, at page 4, had this to say:

> Mr. Clark's Petition consists of 24 pages and 35 numbered paragraphs. Many of the issues raised in the Petition have been previously addressed by this Court or an appellate court. Other issues appear to be without merit; however, argument by counsel may prove otherwise.

This statement was consistent with the court's statement at page 292 of the transcript of the April 22, 1982 hearing in discussing the other issues that "there will be strictly legal issues and I'll review them in an oral argument setting."

No cross appeal was taken.[5] The appeal of course removed the case from the trial court's jurisdiction, and there was nothing the petitioner could cross appeal since there had been no hearing on any issue except ineffectiveness.

The court concludes that the petitioner has not abandoned his claims that were not addressed by the trial court or the appeallate court; however in light of the appeallate court's refusal, after being requested to do so, to remand the case to the trial court to consider those claims, the court also concludes that the petitioner has exhausted those claims.

In any event, the principal claim addressed by the parties in this action, and the one counsel concede is the main one, is the claim of ineffectiveness at the sentencing stage, and the court will address that claim.

INEFFECTIVE REPRESENTATION

"[B]oth the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact." *Strickland,* at p. 4573. Consequently the court is not bound by nor should it give the deference commanded by 28 U.S.C. § 2254(d) to a state court conclusion of ineffectiveness, *id.* at p. 4573. What historically happened is of course a finding of fact to be accorded that deference. Whether what happened constitutes ineffectiveness is not.

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[5]Except for a brief reference to the admissibility of a confession at the guilty phase, the state petition for habeas was limited to the sentencing phase.

PERFORMANCE

On June 23, 1978, prior to the indictment on July 17, 1978, and in anticipation of the preliminary hearing, Gary V. Davis was appointed as counsel for the petitioner. On Davis' motion, another attorney, Ian M. Rodway, was appointed co-counsel, on August 23, 1978. In the meantime, a mental examination pursuant to then Va. Code § 19.2-169, to determine petitioner's competency to stand trial, had been ordered. An August 7, 1978 report on that examination, from Dr. Ludwig Fink, a psychiatrist, found Clark competent to stand trial. The report noted, in addition, that during the doctor's interview with him he "remained . . . pleasant, almost too pleasant considering the seriousness of the alleged crime. What struck me was his complete lack of emotion and any affect. . . . With similar detachment he stated he would try to obtain the death sentence and be executed rather than be sentenced to life in prison. For a 21 year old this is quite an unusual statement." The report closed with the comment that though he was competent to stand trial, "considering his attitude I would suggest that he be sent for a more thorough examination of his mental and emotional condition to a mental hospital before trial." (Trial Record 13).

In addition to the foregoing, trial counsel were aware of the following, prior to the August 29, 1978 trial:

1. Clark told Davis that he would agree to testify against others implicated in the alleged murder for hire in exchange for the death sentence with no recommendation for life, on condition that he be put to death by the needle or pills rather than the electric chair. It was this advice that caused Davis to ask for the appointment of co-counsel. Davis felt Clark's request was unusual to say the least.

2. That Clark showed absolutely no remorse for his crime, nor any fear or anxiety about possible execution, that his stated reason for the killing was the money, the excitement and the thrill.

3. That at an early age Clark's parents had separated.

4. That he had been burned when he was approximately ten years old, prior to which there had been a number of separations between his parents, that the burn was painful, and that he had problems in two different hospitals. Following the burn he "sort of went wild."

5. That he had a younger brother, to whom he was very close, who had been killed. He and his brother lived "on the street" for a while at age 15-16 and for a while lived with a prostitute.

6. That he had a felony arrest in approximately 1977, and that there had been a presentence report done in Maryland in connection with that charge.

7. That he had been shifted back and forth between his parents several times at an early age, and had spent a lot of time with babysitters.

8. They may have known that his mother was a prostitute.

9. That if counsel obtained a psychiatric report prior to trial, it could be obtained under a protective order, i.e., the report could not be used against him at trial without his consent.

Both trial consent concluded that there was really no defense to the crime insofar as guilt was concerned, and that their only hope was some mitigation at the sentencing phase of the trial which would spare Clark the death sentence.

No further psychiatric examination of petitioner was performed or requested by trial counsel. No attempt was made to use Dr. Fink as a mitigating witness. No inquiry was made concerning any presentence report by a probation officer in connection with the 1977 felony conviction. The only members of Clark's family who were interviewed by counsel were Clark's father, James Clark, Sr., his mother, some of his contemporaries and his girl friend.[6] No neighbors or former teachers were contacted. No other members of his family, sister or grandparents, were interviewed.

At the sentencing phase two witnesses were called for the defense, Clark's mother and father. Their testimony covers eight pages of the transcript. The burn was mentioned, although not

[6] No claim is made that the failure to call the contemporaries or the girl friend ineffectiveness.

the painfulness (screaming) or circumstances (stench and maggot infestation) of the hospitalization for it. The father testified with very little elaboration that after the burn Clark became a behavioral problem. The separation between his parents and his being raised by his grandmother was brought out. The mother testified that he was burned, but that no change was noticeable in him after the burn. Not brought out was any evidence concerning Clark's younger brother having been killed. The jury deliberated approximately 40 minutes before announcing its decision imposing the death sentence.

As is required by the Virginia statute, § 19.2-264.5, a further hearing is held after an investigation by a probation officer before the death sentence is imposed. At this hearing the accused has the right to present any additional facts he desires bearing upon the matter. For good cause the trial judge may set aside the death sentence of the jury and impose life imprisonment. In this case, at the instance of the trial judge, a report was prepared after a psychiatric examination by Dr. William S. Atherton, for use at the final hearing (Trial Record 72). The report was dated November 20, 1978, and trial counsel were advised of this report prior to the November 21, 1978 final sentencing hearing. The report diagnoses the accused as "301.7—Personality Disorder; Antisocial Personality." At that hearing the probation officer testified and was cross-examined by trial counsel. No psychiatric evidence was offered other than the report of Dr. Atherton. Trial counsel again called Clark's father and mother, who again discussed the burn in more detail, and, this time, discussed the killing of Clark's younger brother. Clark himself testified at this hearing. He discussed his burn, his use of drugs, living on the street, living with a prostitute, his arrest and escape in Maryland, the death of his brother and the arrangements for and details of the killing. Following this counsel presented closing argument and the court imposed the death sentence.

The court concludes that faced with almost certain defeat at the guilt stage of the proceeding, with the only hope for their client to be the presentation of some evidence of mitigation at the sentencing phase, trial consel's failure to seek out psychiatric evidence or at least to pursue further evidence from lay witnesses, all of whom were available upon reasonable inquiry, to aid them,

was unreasonable. Here counsel were aware of a number of factors, enumerated above, the cumulative effect of which, if not singly, surely indicated *at the very least*, an inquiry by a trained psychiatrist and further lay inquiry. This failure denied the petitioner reasonably effective assistance, and counsel's performance in this regard fell below the range of competence demanded of lawyers in criminal cases. *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

The failure to pursue the psychiatric inquiry which was so obviously called for cannot be defended as a tactical decision, at least for the performance component of the ineffectiveness inquiry. Counsel were not armed with the wherewithal to make a tactical decision without further psychiatric information and lay testimony. The psychiatric information might not have proved useful. It might have proved harmful. But it could have been obtained under a protective order and it would have allowed counsel to make an informed tactical decision.

PREJUDICE

The prejudice component of the ineffectiveness inquiry is more difficult. At the state habeas hearing further lay evidence, from witnesses whom a reasonably competent attorney would expect to have had information concerning Clark's past, and results of psychiatric and psychological examinations revealed the following:

1. In much more detail the list of tragedies in Clark's life as a youngster, beginning with his parents' separation, living with first one parent, then another, then a grandparent; the squalid condition under which he was kept (or neglected) by babysitters; his exposure to his mother's prostitution and lesbian affair; the painfulness and horror of his burn over 40% of his body and how that affected him, both in his embarrassment at his appearance and his work at school; the closeness between him and his brother and how the killing of his brother affected him; the mother's attempted suicide and being found by Clark and his brother; and his use of drugs and living on the street and with prostitutes.

2. Evidence from a psychologist and psychiatrist (Follansbee and Saunders, PX 1 and 2, habeas hearing), that factors enumerated in paragraph 1 as well as the results of in-depth interviews with Clark, disclosed that he should be regarded as a psychologically and morally defective and disabled person. He has never developed a conscience and is in essence completely amoral.

There is no way of knowing with certainty whether, had the foregoing been presented to the factfinder, be it jury or judge, the sentencer would have concluded that they were sufficiently mitigating to warrant life as opposed to death. The law, however, does not require such certainty. It only requires a reasonable probability, which is defined as "a probability sufficient to undermine confidence in the outcome." *Strickland, supra* at p. 4572. When it is remembered that the petitioner only had to persuade one of the twelve jurors to hold out for mitigation[7] the court concludes that its confidence in the outcome of the sentencing phase is undermined by the revelation of the evidence which, but for the attorney errors, would have been presented to the jury.[8]

Respondents argue, however, that had the psychiatric and psychological evidence been adduced it would have opened the door for the Commonwealth to argue future dangerousness as warranting imposition of the death penalty. Section 19.2-264.4C does permit imposition of death if the Commonwealth proves that "there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing threat to society. . . ." This issue was not submitted to the jury as a basis for imposition of the death penalty, but respondents say that if the Saunders and Follansbee reports or

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[7] Under § 19.2-264.4E, in the event the jury cannot agree as to the penalty, the jury is to be discharged and a life sentence imposed.

[8] There is no showing that the evidence adduced at the habeas hearing was not available or could not have been developed at the trial had trial counsel undertaken to investigate and develop it.

evidence had been presented to the jury, the Commonwealth would have been justified in requesting such a submission. Even if such a theory was submitted of course there is no assurance that the jury would have accepted it; and when it is remembered that only one juror need be persuaded and that the guilt phase of the case was viewed as hopeless, competent counsel *might* well have felt that they really had to take the chance that the ameliorating aspect of the evidence would outweigh the adverse aspect. Certainly the additional lay testimony would not have indicated dangerousness and *may* well have *excited sympathy*.

Moreover, a close examination of the two expert witnesses' testimony casts some doubt on whether they *both* are saying there was a probability of a continuing serious threat to society. It is true that Saunders, the psychologist, said, at page 262 of the transcript of the April 21, 1982 hearing, that Clark was an extremely dangerous individual who would not refrain from illegal behavior, and would carry out another killing if offered money to do it. Follansbee, the psychiatrist, on the other hand, was careful to limit his opinion to Clark's being dangerous in 1978, and disclaimed any ability to predict with any certainty his behavior in the future (April 21, 1982 hearing, pp. 302-308). Counsel need not have called Saunders.

Even with this testimony from Saunders and Follansbee, and a recognition that the finding of amorality would itself be a factor supporting a finding of a continuing threat to society, the court is still persuaded that there is a reasonable probability that had the sentencer heard this evidence, at least one juror and perhaps all, as well as the trial judge, would have concluded that, balancing the aggravating factors, of which there were many, and mitigating factors, of which there was a significant number, the death penalty was not warranted.

Accordingly the court concludes that petitioner was not afforded effective representation at the sentencing stage of his August 29, 1978 trial; the sentence of death imposed on November 21, 1978 in accordance with the August 29, 1978 verdict of the jury will be vacated; and it will be ordered that the petitioner shall be resentenced by either the judge of the Circuit Court of Fairfax County or a jury pursuant to Va. Code § 19.2-264.3C

The petitioner has raised other issues. The court has considered them, particularly the so-called *Witherspoon* problem with an excluded juror. *Witherspoon v. Illinois*, 391 U.S. 510 (1968). None warrant any further discussion than was given most of them on direct appeal to the Virginia Supreme Court from the original trial. *Clark v. Commonwealth, supra.* The court rejects those considered by that court for the same reasons. As to the others, the court finds them to be without merit as not of constitutional dimension.

/s/ _____
United States District Judge

Alexandria, Virginia
June 24th, 1985

IN THE UNITED STATES DISTICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

JAMES T. CLARK,
Petitioner,

V.

CIVIL ACTION NO. 84-1271-AM

S. L. TOWNLEY, *et. al.,*
Respondents.

AMENDED ORDER

Deeming it proper so to do, it is hereby ORDERED that the Order of June 24, 1985 is amended to read as follows:

For the reasons set forth in the Memorandum Opinion this day filed, it is ORDERED that:

1. The petition for habeas corpus, to the extent it challenges the legality of the sentencing procedure pursuant to which the petitioner was sentenced to death on November 21, 1978 by the Circuit Court of Fairfax County, Virginia, in accordance with the August 29, 1978 verdict of the jury, is granted.

2. The said sentence of death is vacated.

3. The petitioner shall be resentenced in the Circuit Court of Fairfax, Virginia, within a reasonable time, either by a judge of that court or a jury impaneled pursuant to Va. Code § 19.2-264.3C, to the extent that the said Circuit Court of Fairfax County, Virginia determines that said code section is applicable.

/s/ G.V.B.

United States District Judge

Alexandria, Virginia
July 12th, 1985

filed Clerk, U.S. District Court, Alexandria, Virginia

Filed July 17 1986

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 85-6601

James T. Clark, Jr.,

Appellee,

versus

S. L. Townley;
Gerald Baliles,

Appellants.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge

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The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Murnaghan, with the concurrence of Chief Judge Winter and Judge Ervin.

For the Court,

/s/ JOHN M. GREACEN

CLERK

86 604

NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

S. L. TOWNLEY, et al.

Petitioners,

v.

JAMES T. CLARK, JR.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TABLE OF CITATIONS

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

S. L. TOWNLEY, ET AL.

Petitioners,

V.

JAMES T. CLARK, JR.,

Respondent.

BRIEF IN OPPOSITION TO

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Respondent, James T. Clark, Jr., respectfully prays that Petitioners' Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit be denied.

ARGUMENT

The Court of Appeals properly applied the Stickland test in affirming the district court's granting of relief.

Petitioner's primary argument in support of their petition is that the district court, and the Court of Appeals, in affirming its decision, misapplied this Court's ruling in Strickland v. Washington, 466 U.S. 468 (1984). As discussed below, however, the conduct of counsel fell well below any reasonably acceptable standard, and Respondent was clearly prejudiced at the sentencing phase of his trial by his counsel's ineffectiveness.

The record shows that the guilt phase of Clark's trial consisted of the introduction of a lengthy confession by Clark,

and the sentencing hearing before the jury began immediately thereafter. Counsel for Clark introduced at sentencing only the very brief testimony of Clark's parents; indeed, the entire transcript for the sentencing phase comprises only eight pages. Counsel were given another opportunity at a later hearing to present mitigating evidence before imposition of sentence by the court, but once again only offered the testimony of the parents, with brief testimony of Clark.

The findings of the district court, adopted and affirmed by the Court of Appeals, demonstrate that Clark was examined by a state psychiatrist prior to trial who rendered a written opinion that, although Clark was competent to

stand trial, his bizarre behavior warranted a hospitalization for a complete psychiatric evaluation. Although Clark's counsel had this report in hand well before trial, they did not seek any further psychiatric evaluation of Clark, nor did they attempt to elicit possibly helpful testimony from the state psychiatrist. Psychiatric testimony introduced at the state habeas proceeding showed Clark was suffering from a diagnosed, debilitating mental illness. Further, the record shows that substantial mitigating testimony from lay witnesses was presented at the state habeas hearing, which would have been available to original trial counsel had they investigated. Among other things, it was shown that Clark was the product of a sordid family

background, whose mother was a lesbian and prostitute who attempted suicide twice, that Clark was raised during his early years by a madam in a house of prostitution, that Clark received severe burns over forty percent of his body in a childhood accident which seriously affected his personality, and that Clark's closest family member, his brother, was inexplicably murdered.

On this record, the district court and the Court of Appeals, in a per curiam opinion, properly applied the two-part test set forth in Strickland, and granted Clark a new sentencing hearing in state court. Counsel's failure to even seek out psychiatric testimony to determine its mitigating effect, and their failure to pursue mitigating testimony from lay

witnesses was unreasonable in face of the overwhelming evidence of guilt. Moreover, this ineffective assistance of counsel prejudiced Clark, as these omissions clearly undermines one's confidence in the proceedings, as found by the original sentencing court, the district court, and the Court of Appeals.

In summary, this case does not present a misapplication of the two-prong test in Stickland, but rather a considered evaluation of a factual setting which graphically demonstrates ineffective assistance of counsel resulting in prejudice to the accused. This was recognized by the Court of Appeals to the per curiam opinion and again by the same court in refusing to rehear the matter en banc. It should also be noted that

Petitioner's Application to Stay Mandate presented to this Court has been denied, even though all of the arguments presented in the Petition for Certiorari were included in support of the request for a stay. At present the district court's order that Clark be resentenced on or before January 15, 1987 is in effect.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Repectfully submitted,

HALL, SUROVELL, JACKSON
& COLTEN, P.C.

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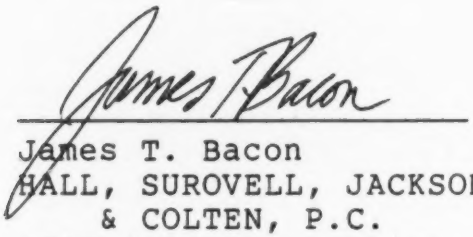
CERTIFICATE OF SERVICE

I, James T. Bacon, a member of this Court, hereby certify that on this 12th day of November, 1986, three copies of the Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit in the above-entitled case were mailed, first class postage prepaid, to Jacqueline G. Epps, Senior Assistant

Attorney General, 101 North Eighth St., Richmond, Virginia 23219. I further certify that all the parties required to be served have been served.



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